In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1824

NEW ORLEANS BOOK MART, INC., FREDERICK ENO-MAYHEW LUND, AND ROBERT MITCHUM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners raise contentions identical to those dealt with in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974. They contend (1) that their convictions must be reversed because they were tried under the *Roth-Memoirs* standards, which, they claim, this Court found impermissibly vague in its subsequent decision in *Miller* v. *California;* (2) that the indictment was insufficient; (3) that *scienter* was not established; and (4) that the application of both *Memoirs* and *Miller* standards by the court of appeals was a violation of *ex post facto* principles. Petitioners also contend that their conviction must be reversed because the government did not introduce evidence, other than the obscene materials themselves, to prove that the materials exceeded customary limits of candor judged by contemporary community standards or that the materials were without social value.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioners New Orleans Book Mart, Inc. and Frederick E. Lund were convicted on nine counts involving three consolidated indictments, and petitioner Robert Mitchum was convicted on six counts of the six count indictment, charging transportion of obscene material in interstate commerce for the purpose of sale, in violation of 18 U.S.C. 2 and 1465. Petitioner New Orleans Book Mart was fined $27,000; petitioner Frederick E. Lund was sentenced to nine concurrent terms of four years' imprisonment; and petitioner Robert Mitchum was sentenced to six concurrent terms of three and a half years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A; 490 F. 2d 73).

The convictions are based on the transportation by common carrier of various obscene magazines and a movie from Atlanta, Georgia, to the New Orleans Book Mart, Inc. in New Orleans, Louisiana. During the months of February, March and April 1970, F.B.I. agents observed the delivery of the various magazines and the movie to the New Orleans Book Mart (d.b.a. South Broad Street Book Mart and St. Peter Street Book Mart) in cartons bearing shipping labels from Peachtree News Co. in Atlanta, Georgia. Copies of the freight bills from Ryder Truck Lines, which did the shipping, were also entered into evidence.

Petitioner Frederick Lund was observed at the Ryder terminal picking up cartons of the magazines; he signed for them and transported them to the St. Peter Street Book Store. Lund filed a claim with Ryder Truck Lines for a shortage of six books in one shipment. Lund was also observed supervising the loading of "nude movie machines" in Slidel, Louisiana, and transporting them to the South Broad Street Book Store. Lund was the authorized agent for service of process for certain purposes on New Orleans Book Mart, Inc.

Petitioner Robert Mitchum was seen in the Peachtree News Co. warehouse in Atlanta and was observed picking up magazines from the cartons. The material in the warehouse was generally "sexually oriented," and some of it was very "strong" material. Films and magazines as well as nude movie machines were shipped from the warehouse.

Petitioner Mitchum signed the corporation sales tax registrations and occupational license applications for New Orleans Book Mart, Inc., Broad Street Book Mart, and St. Peter Street Bookstore.

All of petitioners' substantive contentions were disposed of by this Court in *Hamling* v. *United States*, No. 73-507, decided June 24, 1974. We rely on that opinion and summarize it here.

1. Petitioners' contention that their conviction must be reversed because they were convicted under standards applicable prior to this Court's decision in *Miller* v. *California*, 413 U.S. 15, is without merit. As this Court ruled in *Hamling*, petitioners should and did receive any benefits available to them from the *Miller* cases.

(a) The trial court instructed the jury to apply national community standards of obscenity. While this Court in *Hamling* held that jurors in federal obscenity prosecutions should be permitted to draw on the standards of their own community, it further held that occasional references to the "country as a whole" in the trial court's instruction dealing with community standards did not materially affect the deliberations of the jury. *Hamling, supra,* slip op. at 12-20. Likewise the instruction here was not prejudical error.

(b) The limitation of materials proscribed by 18 U.S.C. 1465 to those patently offensive representations, or descriptions of that specific "hard core" sexual conduct given

as examples in *Miller (United States* v. *12 200-Ft. Reels of Film,* 413 U.S. 123), does not render 18 U.S.C. 1465 unconstitutionally vague as it was construed prior to *Miller. Hamling, supra,* slip op. at 20-25.

(c) *Miller's* rejection of *Memoirs'* "social value" formulation did not mean that 18 U.S.C. 1465 was unconstitutionally vague at the time of petitioners' convictions because it did not provide them with sufficient guidance as to the proper test of "social value." The social value formula was rejected in *Miller* not for reasons of vagueness but because it departed from *Roth's* obscenity definition and created a virtually impossible prosecutorial burden. *Hamling, supra,* slip op. at 26-27.

2. The indictment below was phrased in terms of the statute and was sufficiently definite to apprise petitioners of the charges against them. The statutory term "obscene" is a legal term of art and, thus, it had a legal meaning giving adequate notice to petitioners. *Hamling, supra,* slip op. at 27-29.

3. The district court instructed the jury that the government must show that petitioners had knowledge of the character or the contents of the publications at the time they caused them to be transported from Atlanta to New Orleans for purposes of sale. This was constitutionally sufficient. *Rosen* v. *United States,* 161 U.S. 29. The evidence was, as the court below found, sufficient to support the jury's verdict. *Hamling, supra,* slip op. at 29-34.

4. The review by the court of appeals under both the *Memoirs* and the *Miller* standards did not violate *ex post facto* or due process principles. By allowing petitioners any benefits from either, the court did not make criminal any conduct that was legal prior to *Miller.* The enumeration

of specific categories of obscene material in *Miller* did not purport to proscribe, for purposes of 18 U.S.C. 1465, conduct that had not previously been thought criminal, but instead added a "clarifying gloss" to the prior construction, making the statute's meaning more definite. *Bouie* v. *City of Columbia*, 378 U.S. 347, 353. *Hamling, supra*, slip op. at 25-26.

5. Petitioners raise the additional contention that the government failed to prove its case because it did not introduce evidence, other than the obscene materials themselves, that the materials exceeded customary limits of candor or were without social value. This Court recently rejected that contention in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56, and *Kaplan* v. *California*, 413 U.S. 115, 121.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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